

FILED

August 20, 2020

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY: _____

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DEPUTY

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

**LINDA JANN LEWIS, MADISON LEE,
ELLEN SWEETS, BENNY
ALEXANDER, GEORGE MORGAN,
VOTO LATINO, TEXAS STATE
CONFERENCE OF THE NATIONAL
ASSOCIATION FOR THE
ADVANCEMENT OF COLORED
PEOPLE; and TEXAS ALLIANCE FOR
RETIRED AMERICANS,
*Plaintiffs,***

v.

**RUTH HUGHS, in her official capacity as
the Texas Secretary of State,
*Defendant.***

Civil Action No. 5:20-cv-00577-OLG

ORDER

On this day, the Court considered the status of the above-captioned case. On July 28, 2020, the Court denied the Secretary's motion to dismiss on sovereign immunity grounds. *See* docket no. 31. For the reasons stated in that Order, the Court rejects the Secretary's argument that sovereign immunity bars Plaintiffs' claims. *See id.* at 14-17. On August 7, 2020, the Secretary appealed that Order, as the denial of sovereign immunity is immediately appealable under the collateral-order doctrine. *See* docket no. 32 (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993)). The Secretary then filed an advisory stating that her understanding of the law is that an interlocutory appeal of a denial of sovereign immunity divests this Court of jurisdiction. *See* docket no. 33 (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). In a responding advisory, Plaintiffs disagree that this Court automatically loses jurisdiction pending the outcome of the appeal, as they argue that the Secretary's appeal is frivolous and dilatory. *See* docket no. 35 (citing *Weingarten Realty*

Inv'r's v. Miller, 661 F.3d 904, 908 (5th Cir. 2011)). Though Plaintiffs do not file a motion to certify the appeal as frivolous, the Court will consider its jurisdiction in the interest of judicial efficiency.

As a general rule, “a notice of appeal [of an order denying immunity] . . . [gives] the appellate court sole jurisdiction and divest[s] the trial court of jurisdiction to proceed with the case.” *BancPass, Inc. v. Highway Toll Admin., L.L.C.*, 863 F.3d 391, 398 (5th Cir. 2017) (quoting *United States v. Dunbar*, 611 F.2d 985, 987 (5th Cir. 1980)). In *Dunbar*, the Fifth Circuit outlined an exception to this general rule in the context of interlocutory appeals of double jeopardy: district courts may maintain jurisdiction if they certify that the appeal is frivolous. *Dunbar*, 611 F.2d at 988. In *BancPass*, the Fifth Circuit extended the availability of this exception to denials of immunity in civil cases, such as here, noting that other circuits had found it proper when a “disposition is so plainly correct that nothing can be said on the other side.” 863 F.3d at 399 (quoting *Apostol v. Gillion*, 870 F.2d 1335, 1339 (7th Cir. 1989)). The Fifth Circuit further noted that the “rule is a permissive one: the district court *may* keep jurisdiction, but is not required to do so . . . [and] ‘[s]uch a power must be used with restraint.’” *Id.* (quoting *Apostol*, 870 F.2d at 1339).

In light of this standard, the Court declines to exercise jurisdiction pending the outcome of the appeal.

SIGNED this 20 day of August, 2020.



ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE